FILE COPY

No. 853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE, *Petitioner,*

against

DEFENDANTS, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES, INC., in Liquidation and ALBERT JORGENSEN, COMMITTEE OF JANET MAC QUEEN, Grace by Grace National Bank of New York and Michael P. Grace, II, its co-guardians, CHARLES MAC DONALD, GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased and JOHN P. BOLAND, *Guardian ad Litem* for JANET MAC QUEEN GRACE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statement of the Case	3
The Federal Question; How Raised and Preserved	8
Reasons for Granting the Writ	10
Conclusion	13

APPENDIX:

A—Order of Court of Appeals, March 3, 1960, dismissing appeal as of right from affirmance of Appellate Division	1a
B—Order of Court of Appeals, December 30, 1959, denying leave to appeal from affirmance of Appellate Division	1a
C—Order of Appellate Division, July 28, 1959, affirming judgment of trial court	2a

CITATIONS

CASES:

Chandler v. Fretag, 348 U.S. 3 (1954)	11
Chin Loy You, ex Parte, 223 Fed. 833 (D. Mass., 1915)	10
Cooke v. United States, 267 U.S. 517 (1925)	10
Glasser v. United States, 315 U.S. 60 (1942)	13
House v. Mayo, 324 U.S. 42 (1945)	11
Powell v. Alabama, 287 U.S. 45 (1932)	10, 11
Roberts v. Anderson, 66 F. 2d 874 (10th Cir. 1933)	11, 13
Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)	10

OTHER:

U. S. Constitution, Sixth Amendment	10
5 U.S.C. § 1005, Administrative Procedure Act	10
28 U.S.C. § 1654, Judicial Code	10

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioner, Michael P. Grace, II, prays that a writ of certiorari issue to review the final judgment in the above matter of the Supreme Court of New York,

County of Nassau, November 4, 1959, affirmed by judgment of July 28, 1959, of the Supreme Court, State of New York, Appellate Division—Second Department, leave to appeal to denied, and appeal of right dismissed, by the Court of Appeals of New York.

OPINIONS BELOW

The trial court rendered an opinion, which appears in volume II of the printed record, at p. 1599. Neither the Appellate Division nor the Court of Appeals rendered any opinions in denying petitioner relief. The pertinent orders of the Appellate Division and the Court of Appeals are included in the appendix hereto; the trial court's opinion is not included in the appendix because the court has been furnished nine copies of the printed record pursuant to Rule 23(1)(i).

JURISDICTION

Final judgment was rendered against petitioner in the trial court on April 3, 1958. R. 115-123. He appealed to the Appellate Division, which affirmed without opinion on July 28, 1959. The judgment of affirmance appears in the appendix hereto. He sought leave to appeal to the Court of Appeals, which was denid without opinion by the Court of Appeals on December 30, 1959. He also filed a separate constitutional appeal (an appeal as of right) in the Court of Appeals, as permitted by New York practice, but which was dismissed on March 3, 1960. Petitioner has no further remedies open to him in any New York court. No rehearings have been sought in any court. If from the dismissal of the appeal as of right, time within which this petition might be filed would expire

June 1, 1960; but if from the denial of leave to appeal of December 30, 1959, time would expire March 29, 1960. After timely application, filed March 24, 1960, time for filing this petition was extended from March 29, 1960, to April 11, 1960, by Mr. Justice Harlan, by order dated March 30, 1960. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

In a civil case and as to one who wishes counsel, does due process guarantee the right to counsel?

Is due process under the Fourteenth Amendment denied where the trial court, in a state civil proceeding, refuses to permit the plaintiff to appear by retained counsel of his choice, and requires plaintiff to appear by counsel who no longer represents him, who does not want to represent plaintiff and who refuses even to speak to plaintiff, and whom plaintiff does not want to represent him?

STATEMENT OF THE CASE

Petitioner and others owned some valuable real property in Nassau County, New York, which a country club desired to buy. See complaint, R. 13-19. The owners, including petitioner, negotiated with the purchaser and entered into a contract of sale, dated May 6, 1955, calling for a price of $950,000. The contract appears at R. 20-50. Later (as alleged in the complaint) petitioner came to believe that the club, some of his co-owners and others, had deliberately concealed from him other offers for the property; concealed the fact that one of his co-owners was an applicant for membership in the club; and had told other potential buyers the property was not for sale. On the theory

that his agreement to the contract had been fraudulently procured, petitioner sued in the Supreme Court of Nassau County to set the contract aside. R. 13-19. Defendants denied misconduct, and made counter-allegations and claims. R. 51-72. A protracted and difficult trial ensued, occupying 14 actual days of trial during the period October 8 through 30, 1957. R. 115. The transcript of testimony appears at R. 176-1598. In addition, there were voluminous exhibits.

Petitioner's case was tried with another case, not involved here, in which petitioner's wife, *guardian ad litem* of an infant owner of a trust interest in the same property, sought to enjoin the trustees from selling the trust interest, based on conflict of interest and lack of authority. R. 88-103.

At the opening of the trial (which was without a jury), petitioner was represented by Charles Haydon, Esq. R. 176. Mr. Haydon had handled petitioner's case since the beginning. R. 673. On October 15, 1957, a Tuesday and the sixth day of trial, Mr. Haydon sought leave to withdraw as counsel for petitioner, because of a personal falling out with petitioner. R. 668-9. The court was concerned about the delay this might cause, R. 669, and asked petitioner if he were willing to continue with Mr. Haydon as counsel. R. 675. Petitioner said yes, subject only to agreeing on a matter of policy. R. 675. The court turned to Mr. Haydon, but he refused to reconsider, R. 679, while making clear that his faith in the justice of petitioner's cause was undiminished. R. 678, see also R. 669. The court then offered petitioner to continue the trial until the following Monday, on condition that petitioner appear at that time with counsel ready to proceed. R. 684. Petitioner felt unable to agree to the offer with-

out counsel to represent him; he said, ". . . I don't know enough about my constitutional rights." R. 684. The court then decided to adjourn until the following Monday, and rule at that time whether to release Mr. Haydon; the court said:

> "If there is other counsel here to go forward on Monday morning, you [Haydon] may be relieved. Otherwise, I shall not relieve you and I will require you to go forward with the case and Mr. Grace will have to take your representation in the matter." R. 685.

The following Monday, October 21, Mr. Haydon still wished to withdraw, and new counsel presented himself, Charles Poletti, Esq. R. 688. Mr. Poletti stated that he and an associate counsel were willing to enter the case for petitioner; he asked for "a reasonable amount of time so that we can read the record and also confer with Mr. Haydon." R. 688. And, "I can assure you [the court] that we will do our job as energetically and as expeditiously as possible, because we sympathize with the situation in which you find yourself." R. 689. And, "Give us a postponement of a few days so that we can prepare, or [associate counsel] feels the earliest he could do it is two weeks." R. 689.

The court refused to grant any continuance whatever: "My order here in this will be, then, Mr. Haydon, that you will be required to continue." R. 697. Mr. Haydon immediately protested, and said, "It seems to me that the effect of your Honor's ruling is either that Mr. Grace is directed to go ahead with someone he does not want, which I think is certainly reversible error, or your Honor may be putting in jeopardy the first five or six days of the trial." R. 698. He added,

". . . if your Honor were to force me to go ahead it seems to me that I could not in justice do a complete job for the client and that in all truth your Honor may be setting up this thing so that there would have to be some reversal or a mistrial and thus the five days would be lost." R. 699. The court refused to reconsider, and stated it was ready to proceed. R. 706. Mr. Poletti withdrew in light of the ruling. R. 706.

The trial proceeded, with Mr. Haydon "representing" petitioner, although as he (Haydon) stated, ". . . I could not honestly confer with Mr. Grace [petitioner] again after what happened." R. 679. Mr. Haydon went through the motions of examining witnesses until Wednesday, October 23, when petitioner instructed him by telegram to proceed no further. R. 983. The court construed the telegram as signifying that petitioner chose to rest his case, R. 986, 987, 993, but petitioner stated this was not so, but that he found it futile to proceed under the conditions forced on him by the court. R. 993, 1002. He protested repeatedly that he had no counsel, R. 1003, 1192, and that Mr. Haydon had refused to speak or confer with him. R. 1003, see also R. 671, 1562. He said:

> "I am making a public declaration on constitutional rights that it is impossible to prosecute this case under the present set of circumstances." R. 1002.

That Mr. Haydon was not in fact representing petitioner is plain from the record. *E.g.*, R. 1038, where Mr. Haydon refused to cross-examine a witness. And see R. 1213, where Mr. Haydon himself described his forced presence as that of a mere "spectator." Mr. Haydon would not even speak to petitioner; petitioner told the court, "I have tried to talk to Mr. Haydon.

There is no response on his part." R. 1562; see also R. 1003, 671. Petitioner made several attempts to secure other counsel, but none would enter under the conditions imposed by the court. R. 1565; see also R. 1213.

The case ended, and the court delivered an opinion, R. 1599-1625, almost a third of which was devoted to justifying its action on the denial-of-counsel issue, R. 1617-1623. The court gave the following reasons:

First, Mr. Haydon "was present at every session and remained throughout the trial ready to examine witnesses and to proceed, except for the fact that Michael Grace requested that he not do so." R. 1622. (This statement implies that Mr. Haydon was willing to proceed, but that petitioner was unwilling for him to do so. The record shows the exact opposite is true; that Mr. Haydon vigorously resisted representing petitioner; that he remained physically present only under court order; that he would not speak to petitioner; and that petitioner discharged Mr. Haydon only several days later, when the farce became ridiculous. See preceding discussion, especially R. 668-9, 675, 698-9, 987, 993, 1002-3, 1038, 1213, 1562.)

Second, the case had been in progress a long time; and it would be unfair to defendants to subject them to the delay necessary to obtain new counsel. R. 1619-20. (The delay requested was merely two weeks at most, R. 689, and proposed new counsel promised to be energetic and speedy, R. 695.)

Third, the trial judge was rotating to another bench after October, and a two-week delay would, he said, have "disrupted calendars and assignments into the succeeding months." R. 1620; see also R. 696. (Mr.

Haydon responded that he was willing to devote 24 hours a day, gratis, to orient new counsel, in an effort to speed disposition. R. 701. Mr. Schultz in the consolidated case thought that with diligence the cases could be finished before the judge rotated. R. 705.)

Fourth, there was already counsel in the consolidated action. R. 1618, 1620. (Actually, a few days after the trial began, a new attorney, Mr. Schultz, entered the other case, R. 668; he was unfamiliar with it, and relied on Mr. Haydon for orientation. R. 674. He did not consider the two actions to be one, nor himself to be involved in petitioner's action. R. 703-4.)

The court stated that the bad relation with counsel was inferrably not without fault on petitioner's part; that some phases of the present case had been litigated earlier; that petitioner had had many attorneys before; that petitioner had some legal training; and that he had "assumed general direction of the litigation on his own account." R. 1622-23.

Having thus disposed of the denial-of-counsel issue, the court decided the merits against petitioner. R. 1623.

After unsuccessfully seeking relief through proper channels to the highest court of New York, petitioner now seeks review in this Court of the New York courts' determinations that there was no denial of due process under the Federal Constitution.

THE FEDERAL QUESTION: HOW RAISED AND PRESERVED

The essence of the federal question was raised at trial, when petitioner repeatedly protested against the denial of the right to counsel. See especially R. 1002, and 1373, where petitioner stated:

"I am making a public declaration on constitutional rights that it is impossible to prosecute this case under the present set of circumstances."

And, ". . . I am, I believe, in a position that the Constitution would not like to see any citizen in, or the courts."

Concededly the due process clause of the Fourteenth Amendment was not expressly invoked by petitioner, a layman; but petitioner, against his will, was without counsel at the time, and hence could hardly be charged with having to claim his rights in more precise legal terminology at that time. In any case, the trial court knew the denial-of-counsel issue was in the case, and discussed it in its opinion.

As soon as he had a chance to engage counsel, petitioner raised the federal question at every stage of the proceeding; see Point III, pages 25-32 of petitioner's brief before the Appellate Division, and Points III, IV and V, pp. 56-70, of petitioner's printed brief on motion for leave to appeal to the Court of Appeals, and pp. 15-22 of his typed Affidavit in Opposition before the same court on motion to dismiss his constitutional appeal. Relief was denied at all stages without opinion,* and so there was, of course, no express ruling on the federal question raised. But since the question was raised, denial of relief was necessarily a determination that petitioner's rights under the federal constitution had not been violated.

Thus, the federal question was raised at trial, and preserved subsequently, to the maximum extent pos-

*In dismissing petitioner's constitutional appeal, the Court of Appeals stated merely ". . . upon the ground that no substantial constitutional question is directly involved."

sible under the circumstances, and is eligible for review by this Court.

REASONS FOR GRANTING THE WRIT

Up to the present time, this Court has never held that an ordinary citizen is entitled as a matter of constitutional right to counsel in a state civil proceeding. In the federal courts, the right is plain. The Sixth Amendment guarantees this right to a criminal defendant,[1] and the right to counsel has been extended to a defendant in a federal contempt proceeding,[2] and to an alien in a deportation proceeding.[3] Federal statute recognizes that a party in any federal court, civil or criminal, has the right to counsel.[4] Even litigants in a federal administrative proceeding have the right to counsel, if not as part of the constitutional right to a fair hearing,[5] then by statute.[6] Under the Due Process Clause of the Fourteenth Amendment, the right to counsel has been extended to state criminal defendants,

[1] The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[2] *Cooke* v. *United States*, 267 U.S. 517 (1925).

[3] See *Ex parte Chin Loy You*, 223 Fed. 833 (D.Mass. 1915); *Powell* v. *Alabama*, 287 U.S. 45 (1932), at pp. 69-70.

[4] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654.

[5] *Cf. Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950).

[6] The Administrative Procedure Act, 5 U.S.C. § 1006(a) states: "Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding."

at first to capital cases,[7] and later to other criminal cases.[8] One court has held that due process guarantees the right to counsel in a state civil proceeding, where the litigant was an Indian.[9] The major gap, not yet determined by this Court, is whether a similar right obtains to an ordinary citizen in a state civil trial.

The declaration which petitioner would have applied to a civil case appears in *Powell* v. *Alabama*,[10] a criminal case:

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they . . . constitute basic elements of the constitutional requirements of due process of law. . . .
>
> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reason-*

[7] *Powell* v. *Alabama*, 287 U.S. 45 (1932).

[8] *E.g.*, *House* v. *Mayo*, 324 U.S. 42, 46 (1945); *Chandler* v. *Fretag*, 348 U.S. 3 (1954).

[9] *Roberts* v. *Anderson*, 66 F.2d 874 (10th Cir. 1933), which held void a state civil proceeding in which the Indian's attorney had not been allowed to appear generally, and the court appointed another attorney not chosen by the Indian, to represent the Indian.

[10] 287 U.S. 45 at 68-69.

ably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (Emphasis added.)

Assuming that a civil litigant does have the right to counsel, and that denial thereof would constitute a denial of due process, then was that right denied here? It is difficult to conclude otherwise. Mr. Haydon, who was petitioner's counsel until he sought to withdraw, remained at trial, under protest, only because the court ordered him to do so. R. 697. He did not assist petitioner, and frankly so conceded.[11] He refused to speak to petitioner. R. 671, 1003, 1562. He warned the court that it was committing reversible error. R. 698, 699.

The farce was not petitioner's fault; petitioner was willing that Mr. Haydon remain on. R. 675, at least until the sham trial had dragged on for two more days, when petitioner finally told Mr. Haydon by telegram he need do nothing further. R. 983, 986. The record does not even show to what extent, if at all, the original disagreement between petitioner and Mr. Haydon was petitioner's fault.

Petitioner made a reasonable attempt to secure new counsel, but when new counsel appeared, he was turned away by the court's refusal to grant a reasonable continuance. R. 689; 705, 706. The excuses given by the trial court for his actions may be distilled into one word, "expediency." Due process cannot be made to depend on the court's convenience (disruption of calendars and assignments, or rotation of the judge); the right to counsel is an empty one if new counsel is unable to proceed save, because of arbitrary limitations of time, in ignorance of the case.

[11] He refused to cross-examine witnesses. R. 1038. He said he was merely a "spectator." R. 1213.

If it be necessary to show prejudice,[12] prejudice was plain: As is shown by the length of the record, and the roster of parties, this was a complicated trial. Petitioner's rights on the merits, whatever they were, lay deeply enmeshed in the intricacies of real-property and contract law. There were numerous interconnected legal relations among the parties. There were issues of credibility calling for skilled cross-examination. His property was at stake, yet he was forced to face, alone, the attorneys on the opposite side. On these facts, the absence of counsel was necessarily prejudicial, and perhaps fatal.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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[12] In *Glasser* v. *United States*, 315 U.S. 60 (1942), a criminal case, the defendant was an attorney who was represented by two other attorneys. The trial court required one of defendant's attorneys to extend his representation to a co-defendant. This Court held that defendant's right to counsel had been denied; it said under these circumstances it was difficult to determine the precise degree of prejudice to defendant, but that that was unnecessary. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." P. 76. The *Glasser* case also repudiates any notion that representation of some other party constitutes, to any degree, the representation to which the party is entitled; for if entitled at all, the party is entitled to the *effective* assistance of counsel.

Cf. also *Roberts* v. *Anderson*, note 9 above, a civil case where the Indian party (when the case was in the state court) was required to subordinate her own attorney to another attorney appointed by the court. The federal court held the state proceeding void because infected by denial of counsel.